

January 29, 1953
Opinion No. 53-18

LAW LIBRARY
ATTORNEY GENERAL

TO:

Mr. Robert Morrison, Chairman
Public Institutions Committee
House of Representatives
State House
Phoenix, Arizona

RE:

House Bill No. 56

QUESTION:

Does proposed House Bill No. 56 contain provisions authorizing the Commissioner or Department of Public Health and Welfare to adopt, make, establish or promulgate rules and regulations and other matters which amount to a delegation of legislative power by the Legislature, which provisions would be contrary to the decision of the Supreme Court of Arizona in the case entitled: 'The State of Arizona, Appellant vs. Marana Plantations, Inc., a Corporation, Appellee'.

At the outset of this discussion it would be well to consider the ruling of the Supreme Court in the above case. Marana Plantations, Inc., was charged with violating the regulations adopted by the State Board of Health with respect to water supply, toilets, bathing facilities, housing, fire protection and garbage facilities in agricultural labor camps, which said regulations were adopted by the board pursuant to the provisions of Chapter 105, 1941 Session Laws of Arizona. The particular section involved reads as follows:

"Sec. 6. Rules and Regulations. (a) The board shall have power to adopt, promulgate, repeal, and amend rules and regulations consistent with law to: 1. define and control communicable diseases; 2. prevent and control public health nuisances; 3. regulate sanitation and sanitary practices in the interests of public health; 4. cooperate with local boards of health and health officers; 5. protect and promote the public health and prevent disability and mortality; 6. isolate any person affected with and prevent the spread of any contagious or infectious disease; 7. govern the transportation of dead bodies; 8. establish quarantine; and, 9. carry out the purposes of this Act. * * *

In the opinion of the court the particular problem involved is set forth and outlined as follows:

"* * * The line of demarcation between what is a legitimate granting of power for administrative regulation and an illegitimate delegation of legislative power is often quite dim. A clear guide for all situations is

indeed difficult. The Board of Health as an administrative board can only do what its name imports, that is to say, it can only administer existing laws created by legislative authority. The difficulty is to properly mark the boundary between administrative and legislative power. It may safely be said that a statute which gives unlimited regulatory power to a commission, board or agency with no prescribed restraints nor criterion nor guide to its action offends the Constitution as a delegation of legislative power. The board must be corralled in some reasonable degree and must not be permitted to range at large and determine for itself the conditions under which a law should exist and pass the law it thinks appropriate. To use the apt phraseology of the late Justice Cardozo in *Schechter v. United States*, 79 L. ed. 1570, 295 U. S. 495, an administrative board cannot be 'a roving commission to inquire into evils and upon discovery correct them' and it must be canalized within banks that keep it from overflowing. It cannot be unconfined and vagrant'. * * * (Emphasis supplied)

Applying these principles to the provisions of Chapter 105 of the Laws of 1941, the court had the following to say:

" * * * Section 5 of the Act involved herein makes it the duty of the board to 'formulate general policies affecting the public health.' The formulation of policies is for the legislature and administrative rules must be within the framework of policies which the legislature has sufficiently defined. *Panama Refining Co. v. Ryan*, 79 L. ed. 446, 293 U. S. 388. The portion of Section 6 supra which gives the board power by rule and regulation to 'regulate sanitation and sanitary practices in the interests of public health' and to 'protect and promote the public health and prevent disability and mortality' in effect cuts the traces and permits the board to wander with no guide nor criterion, with no channel through which its powers may flow. It may flood the field with such sanitary laws as its unrestrained discretion may dictate. It may upon investigation discover what it might think are evil conditions and proceed to adopt whatever remedial legislation might suit its fancy. In fact, that is exactly what has been done under the regulations herein challenged and designated as Part XI of a 'Sanitary Code'. We think that the attempt by the legislature to make it the duty of the board to 'formulate general policies affecting the public health' and to give the board unrestrained power to regulate sanitation and sanitary practices and promote public health and prevent disability and mortality is a constitutional relinquishment

of its legislative power and to such extent is violative of constitutional principles, and the so-called Sanitary Code applicable to agricultural labor camps is void. We do not wish to be understood as declaring that Chapter 105, Session Laws 1941 is unconstitutional and void in its entirety, but only to the extent herein announced." (Emphasis supplied)

It is obvious from the foregoing language that the so-called regulations and rules with respect to the Sanitary Code of the Board of Health were held by the court to be void and that the language of Section 6 giving the board power to adopt rules and regulations was an unlawful delegation of legislative power to the administrative board involved.

Referring to House Bill No. 56, Section 4.(a) thereof provides as follows:

"Sec. 4. Commissioner. (a) The commissioner of public health and welfare shall make, establish and administer all rules, regulations, policies and procedures, approve long range plans for developing departmental programs, and coordinate the activities of the department with those of related state agencies. * * *" (Emphasis supplied)

The proposed language of said Section 4. (a) definitely is contrary to the decision of the court in the Marana Plantations case, for said language is an even broader delegation of legislative power than was set forth in Section 6 of Chapter 105 of the Laws of 1941; the same sub-section of the proposed new bill, likewise authorizes the commissioner to make, and establish "policies", concerning which the Supreme Court in the Marana case held was a matter for the legislature to determine and that the administrative rules must be within the framework of policies which the legislature has sufficiently defined. Sub-section (a) of Section 4 of proposed House Bill No. 56 will definitely, therefore, have to be amended in such manner that the legislature will set forth and formulate the general policies affecting the public health of the State, and establish the fences and other limitations within which the commissioner will be authorized to set up administrative rules in order to comply with the decision of the court in the Marana Plantations case.

Referring to Sub-section (e) of Section 4 of proposed House Bill No. 56, it is to be observed that it authorizes:

"(e) The commissioner shall establish county advisory boards, appoint members to, and designate the duties thereof. * * *" (Emphasis supplied)

It would seem that this language is a delegation of legislative powers to the commissioner as the language is broad enough to authorize the commissioner to designate duties other than mere administrative duties and does not prescribe restraints or limitations upon the commissioner in setting up the duties of the County Advisory Boards. It would seem that the language of this section should be changed in such a manner as to restrict the authorized duties to administrative matters.

Referring to Section 7 of proposed House Bill No. 56, and particularly to the provisions of Sub-section (a) thereof, it would appear at first sight that the language of that section would give the Commissioner of Public Health and Welfare the identical rule-making power that was set forth in Section 6 of Chapter 105, Laws of 1941 and, therefore, be flying directly in the face of the decision of our court in the Marana Plantations case. However, upon checking out the effect of the repealing clause set up in Section 18 of proposed House Bill No. 56, all of the provisions of Chapter 105, Laws of 1941, except Section 10 and Section 14 thereof, are repealed by the express provisions of said Section 18 and, therefore, could not be carried over under Section 7 of the proposed House Bill No. 56.

Referring to Section 8 and the provisions of sub-section (c) 3. thereof, it would seem that the language thereof authorizing the departments to: " * * * exercise sanitary control over public and private water supplies and abate the pollution of streams or other water sources, for the protection of the health of the public, * * * " gives the department unlimited power over the matters described therein without sufficient restriction and definition by the legislature and, therefore, would be an unlawful delegation of legislative power to the Department of Public Health and Welfare. Said section should be amended to include proper language defining and restricting the activities and powers of the board in connection with said matters.

Referring to Chapter 13, Laws of 1951, which was the bill enacted by the 20th Legislature in 1951 to reorganize the Health, Welfare and Correction Departments of the State of Arizona, this bill, since repealed, set up and established four divisions in the language of Section 8 thereof. Proposed House Bill No. 56 does not set up any separate divisions under the language of the act but instead, Section 8 (a) authorizes the commissioner to "organize the department into such divisions, sub-divisions or units as he deems most efficient and economical and consolidate or abolish the same".

This language contemplates definite future action by the commissioner following the enactment of this measure by the legislature. Sub-section (b) of Section 12, and Section 14 of proposed House Bill No. 56 pick up and use language identical to that used

in the appropriate sections of Chapter 13, Laws of 1951, and specifically provide that certain employees "are transferred to a board, council or division created under the provisions of this act" (emphasis supplied) and that duties, authority, and jurisdiction thereof, are transferred to a board, council or division created under the provisions of this act" (emphasis supplied).

Since no divisions are created under the provisions of House Bill No. 56 but will come into existence at such time as the commissioner shall create the same after the enactment of the measure, it would seem that the transfer of such employees and of such powers and duties should be made to the department and to the respective divisions thereof to be established by the commissioner.

The suggestion made in foregoing three paragraphs hereof obviously have no connection with the decision of the Supreme Court in the Marana Plantations case but are merely suggested changes of form.

ROSS F. JONES
Attorney General

ANTHONY T. DEDDENS
Assistant to the
Attorney General